No. 84-1687

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

RONALD O. BUBAR; DONALD J. NOWATZKI; WILLIAM M. BARTH; CHARLES W. HOUPT; JOHN J. NETTERBERG; and JAMES F. PALO,
Petitioners,

VS.

AMPCO FOODS, INC., a corporation; ALEXANDER & BALDWIN, INC., a corporation; and R. FOODS, INC., a corporation,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS ALEXANDER & BALDWIN, INC. AND R. FOODS, INC.

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QUESTION PRESENTED

Where petitioners were among those negotiating for possible purchase of a potato processing company, but had no contract and were neither able nor prepared to finance the purchase, was summary judgment for respondents properly granted on the ground that petitioners lacked standing to sue under § 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15, because they were not injured in their "business or property?"*

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* Respondents are Ampco Foods, Inc., a corporation, Alexander & Baldwin, Inc., a corporation, and R. Foods, Inc., formerly known as Rogers Foods, Inc., a corporation. Pursuant to Rule 28.1, a listing of the parent companies, subsidiaries and affiliates of respondents Alexander & Baldwin, Inc., and R. Foods, Inc., is contained in the Addendum hereto.

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PRELIMINARY STATEMENT

Petitioners are former employees of respondent R. Foods, Inc. ("Rogers"), a processor of potato, onion and garlic products. Petitioners brought an antitrust action in 1980 after respondent Alexander & Baldwin, Inc. ("A&B"), the parent corporation of Rogers, sold Rogers' potato division assets to respondent Ampco Foods, Inc. ("Ampco"). Petitioners did not sue in their capacities as former officers or employees of Rogers but as alleged prospective purchasers of Rogers. A&B had offered to sell Rogers to petitioners, but they were unprepared and unable to finance the purchase.

The trial court granted summary judgment dismissing the action on the ground that petitioners lacked antitrust standing to maintain the suit: It was undisputed that at the time of the alleged antitrust violation petitioners were not existing competitors in the potato processing business, they did not have the ability to finance

the purchase of such a business and they had no contractual commitments to procure either the necessary facilities or the financing required to proceed.

The Ninth Circuit affirmed. Although recognizing that a potential competitor can have antitrust standing *if* he has a genuine intent to enter a market and preparedness to do so (Pet.Appx., p. 23a), the facts were that petitioners were never able or prepared to enter the market:

> "[Petitioners] were potential minority stockholders in a corporation yet to be formed, which sought to enter the processed potato market. The venture capital groups who were to be the seventy-five to ninety percent stockholders had not determined whether they were going to invest in the project. Even with the prospective participation of the venture capital groups, another $500,000 to $800,000 would yet have to be raised, either by debt or additional equity financing, and there were no commitments for such financing. The [petitioners] never had a binding contract or commitment or option to acquire the assets necessary to enter the market. We agree with the District Court that the [petitioners] in this posture did not have standing to bring this private treble damage antitrust action" (Pet.Appx., pp. 43a-44a).

No reason exists for this Court to review the judgment. The decisions below turn on the particular facts of the case. There are no conflicting decisions, no novel or important issues of law and no elements of great public interest at stake. In addition, the decisions below are correct: After extensive discovery, the evidence was undisputed that petitioners had not reached the point where they or anyone else had invested or were prepared to invest in the enterprise they hoped to form. Any injury was to petitioners' hopes of what might have occured *if* petitioners had invested in an entity that did succeed in buying Rogers' stock and entering the market.

STATEMENT OF THE CASE

Petitioners' statement of the case is inaccurate. The facts are set forth in the opinion of the court of appeals (Pet.Appx., pp. 3a-

14a), where the evidence is viewed in the light most favorable to petitioners (Pet.Appx., p.3a).

In the summer of 1978, A&B decided to divest itself of its subsidiary Rogers. In July 1978 petitioners became interested in purchasing Rogers, if financing could be obtained (Pet.Appx., pp. 4b-5b). A&B told petitioners it would look favorably on the possibility of a sale to them (Pet.Appx., p. 4a). During the next several months, petitioners spoke to a number of venture capital groups and bankers in an effort to obtain financing (Pet.Appx., p. 5b). In November 1978, A&B publicly announced its intention to sell Rogers, and respondent Ampco expressed interest in purchasing Rogers (Pet.Appx., p. 4a). Ampco proposed in December to buy just the Rogers potato division assets for $10 million, leaving A&B with the onion and garlic division assets (Pet.Appx., p. 5a). A&B then proposed to petitioners a sales price of $13.5 million for all of Rogers (Pet.Appx., pp. 5a-6a). Petitioners were told A&B would meet with them and others interested in Rogers during the week of January 8, 1979; petitioners agreed to meet with A&B on January 9, 1979 (Pet.Appx., p. 6a).

Because A&B had indicated that it would accept certain of Rogers' assets as part payment, the cash that would have been required of petitioners to purchase the Rogers stock was $3.8 million (Pet.Appx., pp. 7a-8a). Petitioners intended to invest $300,000 among their six members as equity capital (Pet.Appx., pp. 35a-36a), but no money was ever put up (Pet., p. 4). There was no contention that petitioners intended to or could borrow the remaining $3.5 million, but they hoped venture capitalists would provide $2.7 million in exchange for a percentage, never determined, of the stock of a new corporation to be formed to acquire the assets or stock of Rogers (Pet.Appx., pp. 8a-10a, 36a). The venture capitalists, however, had not agreed to participate and there was doubt that they would (Pet.Appx., p. 9a); there was no agreement or understanding as to what percentage of stock petitioners would receive, who would be the other shareholders, or in what amounts (Pet.Appx., pp. 10a-11a). Another $800,000 would have to have been borrowed (Pet.Appx., p. 8a). Though petitioners had discussed with several banks the possibility of a loan, no commitments had been made; nor had any bank provided

a commitment for an $8 million line of credit required for working capital (Pet.Appx., pp. 8a-9a).

On January 9, 1979, petitioners advised A&B that the $13.5 million figure was acceptable but that they did not have financing and needed 120 days while the venture capitalists examined Rogers' books and presented the investment proposal to their investment committees (Pet.Appx., p. 12a). A representative of one of the venture capital firms, who attended this meeting, told A&B his firm needed six weeks to make a decision (ibid.). A&B declined to give petitioners an exclusive status or option as the only party A&B would negotiate with during the period and told petitioners it would "get back to them" (ibid.). After consultation among A&B management, A&B concluded that petitioners' proposal was unacceptable (Pet.Appx., pp. 27b-28). Thereafter, A&B informed petitioners that it had decided to sell the potato division assets to Ampco (Pet.Appx., p. 13a).

In late January 1979, the Antitrust Division of the Department of Justice commenced an investigation into the transaction (Pet. Appx., p. 13a). A&B told petitioners to cooperate with the investigation; they did so and provided statements and documents to the Department of Justice (ibid.). The Department of Justice announced in March that it would not challenge the transaction and the sale to Ampco closed March 15, 1979 (Pet. Appx., pp. 13a-14a).

Petitioners' complaint in the district court alleged a breach of contract by A&B, inducement of a breach of contract by Ampco and violation of the antitrust laws by Ampco, A&B and Rogers. The district court found that petitioners had had no contract with A&B to purchase Rogers (Pet.Appx., p. 24b) and also that petitioners had no standing to maintain a private treble damage antitrust action because they had no business or property injured by the alleged antitrust violation: "The Plaintiffs were merely negotiating for the purchase of Rogers Foods with Alexander & Baldwin" (Pet.Appx., p. 30b).

On the appeal, petitioners did not challenge the district court's dismissal of their breach of contract claim. The court of appeals

affirmed the summary judgment on the ground of lack of antitrust standing.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The decision below turns upon an analysis of the particular facts which were proffered to the trial court and raises no important question which should be settled by this Court.

Both the trial court and the court of appeals correctly analyzed the issue of petitioners' antitrust standing in terms of whether petitioners had shown a genuine intention to enter the processed potato market and a preparedness to do so (Pet.Appx., pp. 1a-33b). Contrary to the arguments made in the petition, the decisions below impose no new restrictions on antitrust standing and are not inconsistent with any other decision.

The district court used the analysis adopted in *Waldron v. British Petroleum Co.* (S.D.N.Y. 1964) 231 F.Supp. 72.[1] It recognized that petitioners satisfied the first two elements of consideration set forth in *Waldron,* but held, based upon the facts of the case, that they did not satisfy the other two.

In affirming the district court, the court of appeals reached the same result following a *Waldron*-type analysis, but also, as mandated by this Court in *Associated General Contractors v. Carpenters* (1983) 459 U.S. 519, 536 n. 33, carefully evaluated

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[1] The *Waldron* court pointed out:

"In determining whether a plaintiff has proved the requisite intention and preparedness, the courts have looked for varying combinations of the following typical elements:

"1. The background and experience of plaintiff in his prospective business. * * *;

"2. Affirmative action on the part of plaintiff to engage in the proposed business. * * *;

"3. The ability of plaintiff to finance the business and the purchase of equipment and facilities necessary to engage in the business. * * *;

"4. The consummation of contracts by plaintiff" (231 F.Supp. 81-82).

the alleged injury to petitioners, the alleged wrongdoing of respondents and the relationship between them in light of the policy factors identified in *Associated General Contractors* (Pet.Appx., pp. 16a-19a, 38a-41a).

Both decisions below were based on the particular facts of the case—petitioners' failure to show preparedness and ability to become a competitor in the potato processing industry.

The contention in the petition that the court of appeals adopted the "shareholder derivative injury" rule as a technical bar to petitioners' standing is incorrect. The court of appeals expressly declined to "determine whether, in every case, a potential stockholder in a corporation to be formed to compete in a market would lack standing" (Pet.Appx., pp. 27a-28a). Rather than establishing a black letter rule, the court looked at the totality of the circumstances "in this case" (Pet.Appx, p. 30a) and concluded that the policy reasons why a stockholder may not sue for antitrust injury to the corporation are

> "*greatly magnified* when we have as plaintiffs potential stockholders of some amount between ten and twenty-five percent of the shares seeking treble damages for injury to their potential stockholder interest in a corporation yet to be formed, where the relative rights of these and other stockholders have not been agreed to by the potential investors" (Pet.Appx., p. 31a, emphasis added).

Nor, contrary to the petition (Pet., pp. 10-13), did either court below suggest that petitioners might have had standing had they sued in the name of the corporation to be formed or joined other parties.[2] And even had a corporation existed, the undisputed lack of ability to finance the business and the lack of contract commitments clearly remained to bar the corporation's standing. As the court of appeals pointed out:

> "[T]he corporation was the potential competitor and there was serious doubt as to *its* preparedness to enter the market.

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[2] The court of appeals noted that the other parties did not even have the requisite intent to become competitors (Pet.Appx., p. 36a); joining them as plaintiffs would scarcely have improved petitioners' standing.

* * * * *

> "Because the corporation was only a potential competitor, the speculative nature of the harm is increased because of the uncertainty that *it* would ever have been financially able to become a competitor" (Pet.Appx., pp. 38a-39a, emphasis added).

Hence the lack of a corporate entity in this case, together with the lack of agreement as to who would participate in ownership and in what proportions, are simply indicia of the petitioners' total lack of preparation and ability to enter the market. They do not constitute a technical bar to standing. The first question which the petition claims to be presented is thus not even before the Court.

The anticompetitive actions alleged in the petition, e.g., the closing of some plants in 1980 and the 1982 changes in dehydrated potato product prices and in farm prices of fresh potatoes, add nothing to petitioners' standing. Petitioners were neither potato growers nor purchasers of potato products. As pointed out in *Associated General Contractors,* it is difficult to understand why, if the alleged violation had any anticompetitive effect on anyone, more directly affected entities have not asserted a claim in their own right (see 459 U.S. at 542, n. 47). Petitioners' concession that actual competitors or customers are not available to vindicate the public interest (Pet., p. 12, n. 2) sheds doubt on the proposition that anyone has been harmed at all.

The further assertion, that petitioners were directly injured because they had "long functioned as the officers and key executives" (Pet., p. 13) of Rogers is simply a belated attempt to bootstrap themselves into court based on Rogers' activity in the marketplace and not their own. Petitioners have conveniently forgotten that *they did not sue in their capacity as former officers and employees (Pet. Appx., p. 20b)*. Therefore, whether Rogers had been a market disrupter, or whether respondent Ampco was attempting to exclude Rogers, is irrelevant to the issue before the Court. The issue is not whether Rogers had a business or property

which could be injured by an antitrust violation, but whether petitioners did.[3]

2. In determining petitioners' lack of standing, the court of appeals correctly considered the factors identified in *Associated General Contractors v. Carpenters.* The decision does not conflict with that of any other court.

Petitioners' attack on the court of appeals for analyzing the standing issue in light of the factors identified by this Court in *Associated General Contractors* is frivolous. The Court there pointed out that it was impossible to announce a black letter rule that would dictate the result in every case and that courts "should analyze each situation in light of the factors set forth in the text" (459 U.S. 536, n. 33). The contention that the court of appeals should have determined standing without considering the speculative nature of alleged harm to petitioners, the potential complexity of apportioning damages and the risk of duplicative recovery (Pet., pp. 14-16) is thus foreclosed.[4]

Moreover, *Associated General Contractors* emphasizes that the central interest of the Sherman Act is in protecting economic freedom of participants in the relevant market (459 U.S. 538). In the case at bench, petitioners were never in the market either as consumers or competitors. Though petitioners may have intended to invest in a new entity which they hoped would become a competitor in the processed potato market, neither they nor anyone else did so. Not only did the entity not exist, but the courts below pointed out the uncertainty that such entity, if it had

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[3] Unlike the individual plaintiff in *Perkins* v. *Standard Oil Co.* (1969) 395 U.S. 642, upon which petitioners rely (Pet., p. 14, n. 3), petitioners were simply never in the business.

[4] Petitioners' reliance on cases such as *Bigelow v. RKO Radio Pictures* (1946) 327 U.S. 251 (Pet., p. 15) is misplaced. *Bigelow* concerns uncertainty as to the *amount* of damage caused by restraints imposed by defendants in violation of the antitrust laws on the business of the complainant. By contrast, the instant case turns on petitioners' failure to demonstrate that they had any business or property which could have been injured at all by an antitrust violation.

been formed, would have been financially able to become a competitor.

In light of the court of appeals' careful analysis of the record and the *Associated General Contractors* factors, there is no further analysis to be made. Petitioners have not shown in what manner additional guidance is required from this Court. The fact that this Court has said that "courts should analyze each situation" does not mean that this Court must review each such analysis.

3. There is no conflict between the circuits raised by the court of appeals' affirming the dismissal of this action.

No decision of any court has found standing in the circumstances present here where:

(a) Petitioners were not in business in the market affected by the alleged antitrust violation;

(b) Petitioners did not have the ability to finance the business or the purchase of equipment or facilities necessary to engage in the business; and

(c) Petitioners had made *no* contractual commitments to procure either the necessary facilities and equipment or the financing necessary to obtain them.

In a transparent attempt to manufacture a conflict, petitioners contend that the Fifth Circuit, "Under similar facts" (Pet., p. 18), found standing in *Industrial Inv. Development Corp. v. Mitsui & Co., Ltd.* (5 Cir. 1983) 704 F.2d 785. There is no comparison between the plaintiffs' state of preparation in *Mitsui* and petitioners' state in this case.

In *Mitsui*, an antitrust action had been brought by an American corporation and its two Hong Kong subsidiaries alleging a conspiracy to keep them out of the business of harvesting timber in Borneo for import into the United States. There was no question as to the financial ability of the *Mitsui* plaintiffs to compete in that market. Moreover, unlike petitioners in this case, the *Mitsui* plaintiffs had signed agreements, including a joint venture agreement with Telaga Mas and the necessary forestry agreement with the Indonesian government, prior to the time the defendants were

alleged to have infiltrated Telaga Mas and succeeded in having it breach its contracts with plaintiffs (see *Industrial Inv. Development v. Mitsui & Co., Ltd.* (5 Cir. 1979) 594 F.2d 48, 50). By contrast, petitioners in the instant case had no contract rights with anyone and no ability to finance their acquisition. Contrary to the assertion in the petition (Pet., p. 19), *Mitsui* does not suggest that an antitrust plaintiff need not have standing if it is alleged that the defendants' conduct prevented it from obtaining standing. *Mitsui* stands for no more than that *in the circumstances of that case* the prospective corporate shareholders had demonstrated sufficient preparedness to enter the market as to have standing to sue for disruption of their joint venture with Telaga Mas.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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(Addendum Follows)

ADDENDUM

LIST OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

Alexander & Baldwin, Inc., a Hawaii corporation, has no parent company and no subsidiaries, other than wholly-owned subsidiaries, except the following: Central Maui Source Development, a Hawaii partnership, and Central Maui Water Transmission, a Hawaii partnership. Alexander & Baldwin, Inc.'s, affiliates, except wholly-owned affiliates, are: California and Hawaiian Sugar Company, a California corporation, Bay and River Navigation Company, a California corporation, Hawaiian Sugar Transportation Company, Inc., a Hawaii corporation, and Pacific Resources, Inc., a Hawaii corporation.

R. Foods, Inc., a corporation, is a wholly-owned subsidiary of Alexander & Baldwin, Inc., and has no subsidiaries and no affiliates other than affiliates of Alexander & Baldwin, Inc.